

FILE COPY

Office - Supreme Court, U. S.
FILED

APR 22 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [REDACTED]
CIVIL

30

MONTGOMERY WARD & COMPANY, PETITIONER,

v.
LUTHER M. DUNCAN, RESPONDENT

MOTION TO DISMISS WRIT OF CERTIORARI
ALTERNATIVE MOTION TO AFFIRM
ALTERNATIVE MOTION TO TRANSFER TO
SUMMARY DOCKET

EDWARD H. COULTER,
KENNETH W. COULTER,
Little Rock, Arkansas.
Counsel for Movant.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939

No. 813
CIVIL

MONTGOMERY WARD & COMPANY, PETITIONER,

v.

LUTHER M. DUNCAN, RESPONDENT

MOTION TO DISMISS WRIT OF CERTIORARI
ALTERNATIVE MOTION TO AFFIRM
ALTERNATIVE MOTION TO TRANSFER TO
SUMMARY DOCKET

To The Honorable, The Chief Justice And The Associate
Justices Of The Supreme Court Of The United States:

Your petitioner, Luther M. Duncan, the respondent herein, respectfully moves this Honorable Court to dismiss the writ of certiorari issued in this cause on April 8, 1940; and, alternatively, to affirm the decision and judgment herein of the United States Circuit Court of Appeals for the Eighth Circuit; and, further, and alternatively, if both of said motions are denied, that this cause be transferred to the Summary Docket for early decision and disposition; and, in support of his motions, he says:

That the sole question involved in this proceeding is the construction of Rule 50 (b) of the Federal Rules of

2 MONTGOMERY WARD & Co. v. LUTHER M. DUNCAN

Civil Procedure promulgated by this court and made effective on September 1, 1938.

That the sole question presented in the petition for the writ herein was whether or not, in cases in which a motion for directed verdict is renewed pursuant to the provisions of said Rule 50 (b), and a motion for new trial is joined therewith, and the renewed motion for directed verdict is granted by the trial court, and that action is reversed by the court of appeals, the motion for new trial passes out of the case, or whether the appellate court must remand the cause to the trial court for its action on the motion for new trial—in other words, whether movant is entitled to alternative relief only, or whether it can exhaust one remedy, and, on failing in that, return to the other.

The only other issue presented by the record herein is whether or not, without regard to the nature of the answer to the above question, movant abandoned its motion for a new trial and estopped itself from thereafter resorting thereto by its action in the trial court in opposing the motion of its adversary to have an order entered on said motion and by there taking the position that the motion for a new trial passed out of the case on the granting of the renewed motion for a directed verdict.

It is believed that the decision and judgment of the Circuit Court of Appeals in this cause are so clearly correct that, upon a reconsideration of the petition, as upon a rehearing, this Court will dismiss the writ; or, alternatively, that this Court will affirm the opinion and judgment of the Circuit Court of Appeals on the ground and for the reason that the question on which the decision of the cause depends is of such nature as not to need or require further argument, there being no federal cases directly in point on the question involved, and representative cases shedding any light on the question having heretofore been cited in the brief in support of the petition for the writ and the brief in opposition thereto.

It is further believed (alternatively) that, in the event this Honorable Court is of the opinion that the motions to

dismiss or affirm should be overruled, then the cause should be transferred to the Summary Docket for the reason that the importance of the question at issue which induced the court to grant the writ, coupled with the preciseness and peculiar nature of the question, and coupled, also, with the fact that but little assistance can be rendered, the court by counsel in the matter of citing any authorities in addition to those heretofore cited in the briefs in support of the petition for certiorari, and in opposition thereto, would induce this Court to transfer this cause to the Summary Docket to the end that the single question involving the construction of one of the Federal Rules of Civil Procedure may be speedily settled.

Wherefore, respondent prays that he have an order of this Honorable Court dismissing the writ of certiorari herein, or affirming the decision and judgment of the Circuit Court of Appeals herein, or transferring this cause to the Summary Docket.

Respectfully submitted,

EDWARD H. COULTER,
KENNETH W. COULTER,
Little Rock, Arkansas.
Counsel for Movant.